THAMBIPILLAI v. BORNEO MOTORS (M) LTD.

[F.C. (Ong Hock Thye C.J. (Malaya), Gill & Ali F.JJ.) September 10, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 52 of 1969]

Hire-purchase — Construction of agreement — Hirer in arrears of payment — Right of owners to terminate hiring — No equitable relief.

This was an appeal against the decision of Abdul Hamid J. dismissing the plaintiff's action for a declaration that the defendants by their seizure and sale of a motor-car which they had hired to him by a written hire-purchase agreement had wrongfully deprived him of the car and converted it to their own use. Clause 9 of the agreement provided that "if the hirer shall make default in payment of any monthly sum payable hereunder for 7 days after the same shall have become due .... it shall be lawful for the owners: (a) without notice to terminate the hiring and resume possession of the vehicle and for that purpose to enter upon any premises where the vehicle may be, (b) and/or by written notice sent (by post or otherwise) to or left at the hirer's last known address forthwith and for all purposes absolutely to determine and end this hiring and thereupon the hirer shall no longer be in possession of the vehicle with the owners' consent nor shall the hirer thereafter have any rights hereunder but such determination shall not discharge any liability hereunder of the hirer or of any guarantor to the owners." The learned judge held that as the hirer was in arrears of his payments, the owners were entitled to terminate the hiring without notice. The hirer appealed.

Held, dismissing the appeal: there was no ambiguity in clause 9 of the agreement when read as a whole and under clause 9(a) the owners were entitled to terminate the hiring without notice.

Cases referred to:—

(1) *Innaya & Anor. v. Lombard Acceptance (Malaya)* Ltd. [1963] M.L.J. 30.

(2) *P.N. Pillay & Co. Ltd.* v. *Kah Motor Co. Ltd.* [1965] 1 M.L.J. 47.

(3) *Campbell Discount Co.* v. *Bridge* [1961] 2 All E.R. 97, 103.

(4) *North Central Wagon & Finance Co. Ltd.* v. *Graham* [1950] 1 All E.R. 780; [1950] 2 K.B. 7.

(5) *Elderslie Steamship Company Limited* v. *Borthwick* [1905] A.C. 93.

(6) *Smart Brothers, Ltd.* v. *Holt and Ors.* [1929] 2 K.B. 303

(7) *Anglo-American Corporation Ltd.* v. *Goodwood Sawmill Co.* [1966] 1 M.L.J. 263.

(8) *Moorgate Mercantile Co. Ltd.* v. *Finch & Read* [1962] 1 Q.B. 701; [1962] 2 All E.R. 467.

FEDERAL COURT

Miss *P.G. Lim* (*N. Ramachandran* with her) for the appellant.

D.L. Pickard for the respondents.

Cur. Adv. Vult.

Gill F.J.: This is an appeal from a judgment of Abdul Hamid J. dismissing the plaintiff's action for a declaration that the defendants by their seizure and sale of motor-car No. NA.2698, which they had hired to him under a written hire-purchase agreement dated 27th April, 1959, had wrongfully deprived him of the car and converted it to their own use, and for damages for trespass.

No oral evidence was adduced at the trial of the action, so that the case rested on the respective pleadings of the parties and some documents which were put in evidence during the course of submissions by counsel, and there was no dispute as to the facts.

The hire-purchase price of the motor-car under the agreement was $7,135, of which a sum of $4,000 was paid by the plaintiff on the signing of the agreement, and he was to pay the balance by monthly instalments of $261.25, the first of such instalments to be paid on 27th May, 1959. Clause 9 of the agreement provided that:—

> "If the hirer shall make default in payment of any monthly sum payable hereunder for seven days after the same shall have become due (whether payment thereof shall have been demanded or not) ..... it shall be lawful for the owners:—
>
> (a) Without notice to terminate the hiring and resume possession of the vehicle and for that purpose to enter upon any premises where the vehicle may be,
>
> (b) and/or by written notice sent (by post or otherwise) to or left at the hirer's last known address forthwith and for all purposes absolutely to determine and end this hiring and thereupon the hirer shall no longer be in possession of the vehicle with the owners' consent nor shall the hirer thereafter have any rights hereunder but such determination shall not discharge any liability hereunder of the hirer or of any guarantor to the owners."

The plaintiff presumably paid in time the first three instalments under the agreement, but thereafter he began to fall into arrear. On 12th October, 1959 the defendants wrote him a letter (P3) advising him that his instalments for August and September amounting to $522.50 were overdue and requesting him to bring this amount up to date. By the 27th April, 1960 when he should have completed payment of all the instalments under the agreement, he had paid only $1,567.50, so that he was in arrear with payment of six monthly instalments. By their letter dated 27th May, 1960 the defendants informed him that unless he paid the sum of $782.25, which was the amount due on that date, by 1st June, they would have no alternative but to terminate the hire-purchase agreement and repossess the motor-car.

On 11th August, 1960 the plaintiff sent the defendants a cheque for $330 in purported settlement of his account. In the accompanying letter of the same date (P4) he stated that the price of the car had come down by $260 within a month of the hiring and asked for that amount together with interest at 10% thereon to be deducted from the hire-purchase price. At the

end of his letter he made out the account as follows:—

Original balance			$3,135.00
Reduction in price	$260.00		
10% interest	26.00	$ 286.00	
Paid to date by instalments		2,391.00	
Repairs to clutch		68.00	
Repairs to platinum point & towing		50.00	
Repairs to window screen dial		10.00	2,805,00
		Balance due	330.00

It is to be observed that deducting the sum of $2,391 mentioned in the letter as the amount which he had paid to date by instalments from the total sum of $3,135 to be paid by way of instalments there was a sum of $744 still due on the date of that letter. Deducting from that amount the sum of $330 paid by cheque on that day, there was still a sum of $414 due, which was the amount stated by the plaintiff in paragraph 5 of his statement of claim as the balance remaining due by 10th August, 1960. Obviously that was the amount due after taking into account the sum of $330 paid by the cheque enclosed with the letter of 11th August, 1960, which could not have reached the defendants earlier than 12th August unless it was delivered by hand on the same day, so that was the amount due on 16th August, the date of seizure of the car.

One of the grounds in support of the plaintiff's claim in the court below was that by virtue of section 5 of the Civil Law Ordinance, 1956 the English Hire Purchase Act, 1938 applied, so that repossession of the motor-car by the defendants was wrongful as being in contravention of section 11 of that Act which provides that where one-third of the amount of the hire-purchase price has been paid by the hirer the owner shall not enforce any right to recover possession otherwise than by action.

In support of that ground counsel for the plaintiff cited the case of *Innaya & Anor. v. Lombard Acceptance (Malaya) Ltd.*[1] in which Hepworth J. on an appeal from a judgment of the sessions court held that as the ground of appeal in relation to the applicability of the English Hire Purchase Act was not pleaded it was not open to the appellant, and that even if the Act did apply section 11 had no application when the goods were in the hands of a third party at the time of the seizure. In the present case the learned trial judge decided, in my judgment quite rightly, that the decision in that case had no application because the question of the hire purchase price was never considered in that case.

The learned trial judge further ruled that the English Hire Purchase Act, 1938 had no application because section 1 of the English Hire Purchase Act, 1954 restricted its application to agreements under which the hire purchase did not exceed £300, it being clear that the hire purchase price in the present case is considerably in excess of that amount. Hepworth J. in the case to which I have just referred did not find it necessary to decide the point as to the applicability of the English Hire Purchase Acts, nor has counsel for the appellant raised that as one of the grounds in this appeal. The point therefore does not call for a decision, but I would add that I know of no local case where it has been successfully argued that the English Hire Purchase Acts do apply in this country. The common law rules relating to hire purchase agreements do apply here by virtue of section 3 of the Civil Law Ordinance, 1956, but I have grave doubts as to whether the English Statutes modifying the common law automatically apply.

The main ground in support of the plaintiff's claim was that, notwithstanding clause 9(a) of the agreement relating to the termination of hiring and resumption of possession without notice, some overt act of determination was required. For this ground counsel for the plaintiff relied on the case of *P.N. Pillay & Co. Ltd. v. Kah Motor Co., Ltd.*[2] That was a case in which a clause in the hire purchase agreement provided that in default of punctual payment of any of the hire-rentals as required by clause 4 "the owners may immediately terminate the hiring and they shall thereupon without previous notice or demand ..... become entitled to the immediate possession of the vehicle and to retake and resume possession of the same and the hirer shall thereupon no longer be in possession of the vehicle with the consent of the owners." Abdul Aziz J. held that under the terms of the agreement the owner could not repossess the motor-car until he had terminated the hiring. Comparing the term of the agreement in that case with the terms in the present case, the learned trial judge found as follows:—

> "In my view, there is no ambiguity in this clause and it seems to me that under clause 9 of the agreement the hiring is *ipso facto* terminated upon default."

The only other point taken by counsel for the plaintiff in the court below was that by reason of section 3 of the Civil Law Ordinance, 1956 it was equitable that the plaintiff should have got some sort of warning. The learned trial judge disposed of this submission by referring to the observation of Harman L.J. in *Campbell Discount Co. v. Bridge*[3] deprecating the attempt to urge the court on what are called equitable principles to dissolve contracts which

are thought to be harsh or which have turned out to be disadvantageous to the parties, and went on to say:—

"In my opinion, where clear and unambiguous provisions are made, as is shown to have been expressly provided in this particular case, the plaintiff cannot rely on the aid of equity."

The judge then referred to the case of *North Central Wagon & Finance Co., Ltd. v. Graham,*[4] which was cited to him by counsel for the defendants, and found that the defendants were entitled to terminate the hiring without notice and thereupon entitled to immediate possession of the vehicle. The plaintiff's claim was accordingly dismissed with costs.

The judgment of the learned trial judge dismissing the plaintiff's action is attacked on the following grounds, as set out in the memorandum of appeal:—

1. The learned judge erred in holding that there was no ambiguity in clause 9 of the Hire Purchase Agreement.
2. The learned judge should have held that the said clause 9 read as a whole is ambiguous on the face as it is uncertain whether or not notice was required to terminate the hiring.
3. The learned judge ought therefore to have held that the ambiguity must be construed in favour of the hirer.
4. The learned judge ought to have held that the appellant was entitled to damages for conversion of the motor-car.

The four grounds of appeal were taken together and the points argued by counsel for the appellant are (a) that there is a distinction between "termination of hiring" and "termination of the agreement and the hiring thereby created", (b) that the hire-purchase document, and in particular clause 9 thereof, must be read as a whole, and (c) that if there is any ambiguity in the wording of clause 9 of the agreement it must be construed against the owner on the doctrine of *verba cartarum fortius accipiuntur contra proferentem,* since it is the owner who frames the agreement and proffers it to the hirer.

It is clear that when an instrument appears on the face of it to be free from ambiguity, but, upon the endeavour being made to apply it to the persons or things indicated, it appears that the words are equally applicable to two or more persons, or to two or more things, there is a latent ambiguity. The ambiguity — in this case also called an equivocation — is not discovered till the instrument comes to be applied to external circumstances (see *Halsbury's* Third Edition, Volume 11, page 412, paragraph 669).

It is to be observed that there is nothing ambiguous about clause 9(a) of the agreement when taken by itself, nor is there any ambiguity in clause 9(a) of the agreement when read in isolation. The ambiguity, it has been argued by counsel for the appellant, arises when clause 9 is read as a whole, because by so reading it the question arises as to whether the hiring could be terminated without notice under clause 9(a) when clause 9(b) required notice for such termination.

That brings me to the rule that the document must be read as a whole, which is illustrated by the case of *Elderslie Steamship Company, Limited v. Borthwick.*[5] In that case, frozen meat shipped for carriage from Melbourne to London arrived tainted with carbolic acid, with which the ship had been disinfected before shipment. The bill of lading contained two exception clauses. The first exempted the shipowner from liability for damage to goods whether arising from a defect existing at the time of the shipment or not, or from the neglect of the master or crew, or from any other cause whatsoever. The second clause also exempted the shipowner from liability for damage from defects, etc., "if reasonable means have been taken to provide against such defects and unseaworthiness". It was held by the House of Lords, affirming the decision of the Court of Appeal, that upon the true construction of the bill of lading the generality of the first clause was qualified by the second clause, and that, reasonable care not having been taken in cleansing the ship before the shipment, the shipowner was liable for the damage in an action brought by an indorsee of the bill. Earl of Halsbury L.C. in the course of his speech said:—

"It seems to me that if what has been called the large print had stood alone I should not have had the smallest doubt that it would have carried the shipowner the whole way. I can give no other construction to it than that which the words express; but the difficulty in his way is that he has thought proper to execute an instrument which has two different sets of phrases in it, and one rule of construction which must prevail is that you must give effect to every part of a document if you can — you must read it as a whole. Mr. Carver has ingeniously spoken of independent contracts and independent paragraphs and so on, but we must remember that this is one contract, and each of the parts of this contract must be read so as to give effect to the whole if it can.

My Lords, the only mode of so reading it is to read the first part of it thus: 'I am not to be liable for this', and then what comes after it by way of exception, 'I shall not be liable unless I have failed to take all reasonable means against the injury' that has happened. In that way you can read the two together, and this seems to me to be the only way in which you can make a reasonable and intelligible contract, and give effect to the words which the parties have agreed to."

Lord Macnaghten said:—

"My Lords, I am of the same opinion. The clause which has been called the large print clause seems to me to be perfectly clear. The small print clause is equally clear. For my part I am unable to reconcile the two clauses. In such a case as this an ambiguous

document is no protection. It is a wholesome rule that a shipowner who wishes to escape the liability which might attach to him for sending an unseaworthy vessel to sea must say so in plain words."

In the present case clause 9(a) empowered the owners "without notice to terminate the hiring and resume possession of the vehicle", which they did. Clause 9(b) says that it shall be lawful for the owners "by written notice ..... forthwith and for all purposes absolutely to determine and end this hiring". Are these two clauses irreconcilable? In my judgment, they are not. Except for a very minor difference, clause 9 of the agreement is similar to *"Smart* v. *Holt"* clause (so called because of its approval by the court in *Smart Brothers Ltd. v. Holt and Others*[6]), as contained in clause 7 of Precedent 12 at page 264 of the *Encyclopaedia of Forms and Precedents*, Volume 7. As was pointed out by counsel for the appellant, the words used in that precedent are "forthwith and for all purposes absolutely determine and end this agreement and the hiring hereby constituted", whereas the words used in the present case are "forthwith and for all purposes absolutely to determine and end this hiring", so that the word 'agreement' is missing here.

In my judgment, the absence of the word 'agreement' in clause 9(b) does not make it irreconcilable with clause 9(a). A hire-purchase agreement after all is a bailment coupled with an option to buy, so that, apart from bailment, the main purpose of the hire-purchase agreement is to enable the hirer to become the owner by observing all the terms and conditions of the agreement. Clause 9(a) here provided for the termination of the bailment and clause 9(b) for the termination of the hiring for all purposes absolutely, which would be tantamount to termination of the agreement because clause 9(b) went on to say that "nor shall the hirer thereafter have any rights hereunder". In other words, clause 9(a) provides for the termination of the bailment and clause 9(b) for the agreement, notwithstanding the omission of the word 'agreement' therein.

It is important to note that it is possible to terminate the hiring (bailment) of the goods without terminating the agreement for all purposes, so that the termination of the hiring does not necessarily put an end to the agreement for all purposes. This point may be of significance in two respects. First, if the agreement continues, although the hiring has otherwise been terminated, the hirer may still be entitled to pay the balance of the hire-purchase price and exercise his option to purchase. Such a right is unlikely to exist under modern hire-purchase agreements by reason of the fact that the option to purchase is usually stated to be exercisable only upon the hirer duly observing the terms and conditions of the agreement (which is the position under the present agreement). Secondly, the goods comprised in the hire purchase agreement made by a tenant may be removed from the protection of any law relating to distress (see *Guest* on The Law of Hire-Purchase, 1966, page 208, paragraph 481).

For the reasons I have stated, in my judgment there is no ambiguity in clause 9 of the agreement when reading it as a whole. We are not concerned in this appeal with the question as to whether or not the hiring has been determined for all purposes absolutely. The question to be decided here is whether, on the true construction of the contract and in the events which happened, the defendants became entitled to possession of the motor-car. It is common ground that the plaintiff was in arrear with some of his instalments of hire. That gave the defendants the right to terminate the hiring and repossess the car. As a matter of construction, I agree with the learned trial judge that clause 9(a) of the agreement did not require notice as a condition precedent to the exercise by the defendants of their right to terminate the hiring. They were entitled to terminate the hiring in any appropriate way, including the most obvious way of taking possession of the car.

In *Anglo-American Corporation Ltd. v. Goodwood Sawmill Co.*[7] I said that whether a written notice is condition precedent to the termination of a hiring in any particular case depends upon the true construction of the relevant clause in the hire-purchase agreement, that a formal written notice is necessary only where there is an express stipulation to that effect in the agreement, and that where a notice to the hirer may be said to be an implied term of the agreement, all that is necessary is for the owner to make a declaration or to do some unequivocal act amounting to such a declaration to the hirer of his intention to terminate the hiring. I would say in all humility that on the authorities, which I reviewed in that case, that would appear to be a correct statement of the law. Counsel for the appellant in this case cited to us the case of *Moorgate Mercantile Co. Ltd. v. Finch and Read,*[8] which far from supporting the appellant, is against him. That was a case in which the relevant clause stated that, in the event of breach, "the owners shall forthwith without notice or demand become entitled immediately to recover possession of the goods; and, if they see fit, may (a) without notice repossess themselves of and remove the goods and/or (b) by written notice ..... absolutely determine and end this agreement and the hiring thereby constituted." The Court of Appeal held, following *North Central Wagon and Finance Co. Ltd. v. Graham,*[4] that, the hirer being in breach of

the terms of the agreement, the owners acquired a right to immediate possession of the goods without further notice, so that they could sustain an action in conversion.

As I have said, there is no ambiguity in clause 9 of the hire-purchase agreement. The finding of the learned judge in the court below that under clause 9 of the agreement the hiring *ipso facto* terminated upon default, by which he meant that no formal notice of termination of hiring prior to taking repossession of the car was necessary, has not been challenged in this court, nor has it been argued that the appellant is entitled to any equitable relief. In any event, as the learned trial judge said, the appellant cannot rely on the aid of equity. In the words of Harman L.J. in *Campbell Discount Co. v. Bridge,*[3] equitable principles are rather too often bandied about in common law courts as though the Chancellor still had only the length of his own foot to measure when coming to a conclusion. It seems to me that all that this court can do is to commiserate with the appellant for getting himself into a position whereby he lost the car as well as all the money he had paid for it and to leave it to him to ruminate over the question as to whether he himself was not entirely to blame for bringing about that situation.

Ong Hock Thye C.J. (Malaya) and Ali F.J. concurred.

Appeal dismissed.

Solicitors: *N. Ramachandran; Donaldson & Burkinshaw.*

UVAL & ANOR. v. ZAINAL

[F.C. (Ong Hock Thye C.J. (Malaya), Gill & Ali F.JJ.) September 10, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 55 of 1969]

Negligence — Highway — Accident — Apportionment of blame — Whether appellate court should interfere with apportionment of liability by trial judge.

This was an appeal against the decision of the High Court in respect of an accident between a motor-cycle of which the appellants were the rider and pillion passenger and a taxi driven by the respondent. The learned trial judge found that the drivers of both vehicles were equally blameworthy. The plaintiffs appealed.

Held, dismissing the appeal: the learned trial judge was correct in deciding that the appellants were partly to blame for the accident and the appellate court would not interfere with his apportionment of the blame as there was no error of law or of fact in his judgment.

Cases referred to:—

(1) *Brown* v. *Thompson* [1968] 2 All E.R. 708, 711.

(2) *Ingram* v. *United Automobile Service Ltd.* [1943] 1 K.B. 612, 614.

(3) *The Macgregor* [1943] A.C. 197.

FEDERAL COURT

D.H. Murphy (*David S.H. Tay* with him) for the appellants.

Thara Singh Sidhu for the respondent.

Cur. Adv. Vult.

Ong Hock Thye C.J. (Malaya) (delivering the judgment of the court): The appellants were the rider and pillion passenger on a motor-cycle when a taxi driven by the respondent ran into it from behind. In the High Court at Seremban the learned judge found as a fact that the drivers of both vehicles were equally blameworthy. He awarded damages in the sum of $1,550 to the first appellant and $5,560 to the second appellant, whose main injury resulted in a one-inch permanent shortening of the right leg and wasting of the muscles.

This appeal raises a number of grounds, all of which were against the findings of fact.

The accident occurred at about 1 p.m. on July 5, 1963 at the 4¼ mile, Mantin Pass, after a left-hand bend of the road. The engine of the motor-cycle had failed. While remaining seated on the saddle the rider was trying to restart the machine while it was in motion. His passenger was, at the same time, from his pillion seat, using his legs to propel the motor-cycle forward. The learned judge, on the whole of the evidence, came to the conclusion that the joint efforts of the appellants most probably resulted in their failure to maintain proper balance, so that the machine, being in motion, must have followed an unsteady course. The accident, in his opinion, could not have happened had they stopped by the roadside to restart the engine. In our opinion the inferences drawn by the learned judge were eminently reasonable and probable. We, too, would have come to the same conclusion. As regards the relative credibility of the witnesses the judge had seen and heard them and we are in no position to substitute our opinion for his.

As regards the apportionment of blame, we would follow the principle enunciated by the Court of Appeal in England in *Brown v. Thompson,*[1] affirming, among others, du Parcq L.J. in *Ingram v. United Automobile Service Ltd.,*[2] who said:—

"It would seem to follow from the decision of the House of Lords in *The Macgregor*[3] that this court should not interfere with the apportionment of liability made by the judge at the trial unless there is some error of law or of fact in his judgment. I come to that conclusion particularly in view of the observations of Lord Wright in that case. In the present case the matter is perhaps one of academic interest because I